Supreme Court, U.S.
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No. 94-1301

In the
Supreme Court of the United States

October Term, 1994

DENNIS HOOD,
Petitioner,

v.

JULIE HERALD,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether application of the discovery rule to permit adjudication of childhood sexual abuse cases involving repressed memories, in which there is no corroborating evidence, violates a defendant's right to due process pursuant to the Fourteenth Amendment of the United States Constitution.

TABLE OF CONTENTS

Page

Statement of the Case 1

Summary of Argument 2

Argument 3

1. Deprivation of due process under the United States Constitution by application of the discovery rule was never raised in the trial court and never decided at any level of Ohio's judicial process. 3

2. This Court should not grant certiorari to review a claim of deprivation of due process on grounds that there was no corroborating evidence, where the record includes Petitioner's recorded admission of the abuse and testimony of witnesses who heard Petitioner admit to the abuse. 5

Conclusion 8

TABLE OF AUTHORITIES

CASES Page

Ault v. Jasko (1994), 70 Ohio St.3d 114, 637 N.E.2d 870 2

Cox v. Texas (1906), 202 U.S. 446 6

Dewey v. Des Moines (1899), 173 U.S. 193 7

Green Bay & Mississippi Canal Co. v. Patten Paper Co. (1898), 172 U.S. 58 5

Illinois v. Gates (1983), 462 U.S. 213 4

LeFort v. Century 21-Maitland Realty Co. (1987) 32 Ohio St.3d 121; 512 N.E.2d 640 6

NLRB v. Pittsburgh S.S. Co. (1951), 340 U.S. 498 7

Webb v. Webb (1981), 451 U.S. 493 4

Whitney v. California (1927), 274 U.S. 357 5

STATUTES

28 U.S.C. Section 1257(a) 3, 4, 8

CONSTITUTIONS

United States Constitution, Amendment XIV, Section 1 ..... 3, 8

Ohio Constitution, Art. I, Sections 1, 5, 16 and 19 6

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TO THE HONORABLE SUPREME COURT:

The respondent, Julie Herald, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the petitioner, Dennis Hood.

STATEMENT OF THE CASE

Respondent Julie Herald's uncle, Petitioner Dennis Hood, began to sexually abuse her in 1962 when she was three years old. He abused her for twelve years. The abuse included actual or attempted oral sex, anal sex, vaginal intercourse, masturbation, and the placement of foreign objects, such as popsicle sticks, in Julie's vagina. The abuse was so horrible that Julie Herald unconsciously forced herself literally to forget what her uncle had done to her.

Respondent's repressed memories returned in a rush on January 2, 1989, when she observed her own three-year-old daughter, who bore a remarkable resemblance to Julie at that age, playfully climb into

bed with a male friend visiting the family. She filed this action in battery and intentional infliction of emotional distress December 29, 1989.

Petitioner's Motion to Dismiss, claiming the suit was barred by the statute of limitations, was denied. The trial court ruled that "the statute of limitations did not commence to run until the Plaintiff discovered that the sexual abuse had occurred." Petitioner never raised a due process objection to the trial court's application of the discovery rule. Petitioner's appeal of this order to the Ninth District Court of Appeals was dismissed for lack of a final appealable order.

After a two-week trial ended with a jury verdict for Ms. Herald, Petitioner renewed his appeal to the Ninth District Court. Petitioner's first assignment of error was that "[t]he trial court's adoption of the discovery rule deprived the appellant of property and reputation without due process of law." His argument was based on the Ohio Constitution. The court refused to consider the question of unconstitutional deprivation of due process of law by application of the discovery rule, on grounds that the issue had not been raised in the trial court. Petitioner's Brief filed with the Ohio Supreme Court argued the same issue—i.e., that application of the discovery rule deprived him of property and reputation without due process of law. It also was based on the Ohio Constitution. Obviously, since Petitioner's appeal was dismissed as improvidently allowed after the Supreme Court in *Ault v. Jasko* (1994), 70 Ohio St.3d 114, 637 N.E.2d 870, had adopted the discovery rule for application in childhood sexual abuse cases involving repressed memories, the issue was not considered by the Ohio Supreme Court either.

SUMMARY OF ARGUMENT

The question Petitioner has presented for review here is whether a defendant's right to due process under the Fourteenth Amendment of the United States Constitution is violated when a discovery rule is applied to allow adjudication of a childhood sexual abuse case "involving alleged repressed memories and no corroborating evidence." Since a federal question was not raised or preserved in the trial court, nor decided at any level of the Ohio judicial system, as required by the relevant jurisdictional statute, 28 U.S.C. Section 1257(a), this Court

has no power to consider the issue.

Furthermore, since there *was* corroborating evidence in this case, not only of Dennis Hood's culpability for sexually abusing his niece over a twelve-year period, but also of the fact that Ms. Herald had indeed been a victim of sexual abuse and had repressed all memory of such acts, this case is not a proper vehicle for deciding the issue.

ARGUMENT

1. Deprivation of due process under the United States Constitution by application of the discovery rule was never raised in the trial court and never decided at any level of Ohio's judicial process.

This Court's certiorari jurisdiction over decisions from the state courts is derived from 28 U.S.C. Section 1257(a), which provides that final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari, where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or laws of the United States. Rule 10.1(c) of the Rules of the Supreme Court of the United States further provides that a review on writ of certiorari will be considered when a state court has decided "an important question of federal law which has not been, but should be, settled by this court . . . ."

It follows then that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows that the federal claim was adequately presented in the state system. *Webb v. Webb* (1981), 451 U.S. 493. See, also, *Illinois v. Gates* (1983), 462 U.S. 213, 217-18.

Moreover, Rule 14.1(h) of the Rules of the Supreme Court of the United States, requires the petitioner to "specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to

the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari." Petitioner here has failed to comply with this rule.

It is essential that a federal question be brought to the attention of the state court hearing the case. *Green Bay & Mississippi Canal Co. v. Patten Paper Co.* (1898), 172 U.S. 58. The record must show that the federal question was raised. *Whitney v. California* (1927), 274 U.S. 357. Petitioner never points to any place in the record where the issue of constitutional deprivation of due process was raised in the trial court. Petitioner simply states that by denying his motion to dismiss and permitting the matter to proceed through jury trial, "the court violated the petitioner's fundamental personal rights provided for by due process." (Petition, p. 2.) This is not sufficient.

Application of the discovery rule was an issue in Petitioner's Motion to Dismiss on grounds that the statute of limitations had run on Respondent's claims. Respondent opposed Petitioner's motion on grounds that the discovery rule should toll the running of the statute until such time as Ms. Herald discovered her injury. In its order denying the motion, the trial court agreed that "the statute of limitations did not commence to run until the Plaintiff discovered that the sexual abuse had occurred." Petitioner had every opportunity to oppose Respondent's argument for application of the discovery rule with a due process claim. He did not do so. Petitioner did argue deprivation of his due process rights in his Appellant's Brief to the Ninth District Court of Appeals and to the Ohio Supreme Court. Both arguments, however, were based upon the Ohio Constitution, Art. I, Sections 1, 5, 16 and 19—not the Federal Constitution. Consequently, a federal question was never raised, nor decided, at the appellate level either.

Moreover, the Ninth District Court of Appeals, in accord with established practice in the Ohio judicial system, refused to consider the constitutional deprivation question because it had not been brought to the attention of the trial court. See, *LeFort v. Century 21-Maitland Realty Co.* (1987), 32 Ohio St.3d 121, 123; 512 N.E.2d 640, 643. An appellate court's justified refusal to consider a question on grounds that it was not raised below is no different from a situation where the issue was in fact never raised. In both cases, the Supreme Court lacks

jurisdiction to review the question. *Cox v. Texas* (1906), 202 U.S. 446.

Petitioner may argue that he did raise a due process claim in his Motion to Dismiss. Petitioner's mention of a violation of his due process rights in his Motion to Dismiss, however, was in reference to Respondent's assertion of a cause of action for intentional infliction of emotional distress; it had nothing to do with the court's application of the discovery rule in this case. The two questions have no relationship, other than the fact that they arise from the same occurrences. This is not sufficient to avoid the jurisdictional requirement that the question presented to the Court must have been raised below. See, *Dewey v. Des Moines* (1899), 173 U.S. 193, 198.

2. This Court should not grant certiorari to review a claim of deprivation of due process on grounds that there was no corroborating evidence, where the record includes Petitioner's recorded admission of the abuse and testimony of witnesses who heard Petitioner admit to the abuse.

The Supreme Court will not grant certiorari merely to review evidence or inferences drawn therefrom. *NLRB v. Pittsburgh S. S. Co.* (1951), 340 U.S. 498. In effect, that is what Petitioner is inviting this Court to do here, however.

Petitioner complains that he was deprived of a meaningful opportunity to defend himself, because he was faced with "vague allegations" of acts which ended some fifteen years before trial, and which were without "corroborating evidence." These statements simply do not reflect the evidence presented at trial.

The allegations were anything but vague. Julie Herald's descriptions of the acts perpetrated upon her by a relative she should have been able to trust were detailed and painful to hear. And there *was* corroboration—from the mouth of petitioner himself.

The jury heard a taped telephone conversation between Julie Herald and Dennis Hood, wherein he admitted he had abused her. In addition, Julie's two therapists, a psychologist who was treating her for stress management when her repressed memories began to return, and a licensed professional therapist whose practice was primarily with

victims of such abuse, testified that Dennis Hood admitted the abuse in their presence. Even Petitioner's expert witness agreed that Julie Herald was a victim of child abuse. There was also testimony from Julie's family, as well as her therapists, about the suddenness of her recall and its impact upon her and her family.

There can be no argument here that Respondent's case was not supported by "corroborating evidence." The factual findings below are supported by substantial evidence. This case was tried fairly below and the result is a correct one. This is not a proper case to consider the question Petitioner presents.

CONCLUSION

Certiorari should be denied. A question of deprivation of due process rights under the Fourteenth Amendment of the United States Constitution by application of the discovery rule was not raised or preserved in the trial court, nor decided at any level of the Ohio judicial system. The requirements of 28 U.S.C. Section 1257(a) to give this Court jurisdiction have not been met here.

But even if the question were raised, this is not the proper case to consider whether a defendant's due process rights are violated by the absence of "corroborating evidence" in the adjudication of a childhood sexual abuse case, after application of the discovery rule, where the record here affirmatively shows that there *was* corroborating evidence. Petitioner had a fair trial here and justice was done.

Respondent requests this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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